



LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT _____ EXT. _____

December 8, 2006

Ms. Lucille T. McInerney, P.E.
Washington State Department of Ecology
Northwest Regional Office
3190 160th Avenue, SE
Bellevue, WA 98008-5452

SUBJECT: Lummi Nation Comments on the October 10, 2006 Draft Remedial Investigation, Feasibility Study, and Supplemental Environmental Impact Statement: Bellingham Bay Comprehensive Strategy – Whatcom Waterway Cleanup Site

Dear Ms. McInerney,

The purpose of this letter is to summarize overall comments by the Lummi Natural Resources Department on the subject draft documents and to transmit specific comments identified either by Lummi Natural Resources Department staff members and/or by environmental scientists with the Seattle District U.S. Army Corps of Engineers (ACOE). As you know, the ACOE scientists have provided technical support in our review of the draft Remedial Investigation/Feasibility Study (RI/FS). The Lummi Cultural Resources Department may be submitting comments on these documents under a separate cover.

Overall Comments:

1. The analyses are incomplete in that they did not evaluate implementation of an important alternative sub-area strategy identified in the 2000 Comprehensive Strategy EIS developed by the Bellingham Bay Pilot Team (Pilot Team). Habitat Action No. 13 identified by the Pilot Team is the removal of the Aerated Stabilization Basin (ASB) from the water and establishment of intertidal and shallow subtidal habitat and marine buffers and/or eelgrass. As described in Appendix A of the 2006 draft Supplemental Environmental Impact Statement (SEIS), Habitat Action No. 13 would result in the single largest habitat gain (33 acres) of all of the actions identified by the Pilot Team. This alternative aquatic land use should have been evaluated in addition to the alternative desired by the Port of Bellingham (i.e., converting the ASB to a marina).

As you know, the Bellingham Bay Pilot Team included representatives from numerous federal, tribal, and state agencies (including the Department of Ecology and the Port of Bellingham) and worked for over 10 years on coordinated clean-up, source control, and habitat restoration planning in Bellingham Bay. As you note in Section 5 of the 2006 draft SEIS, the Bellingham Bay Pilot included an unprecedented level of community involvement and public outreach activities. In the alternatives analysis presented in the 2006 draft SEIS, if an alternative did not include converting the ASB to a marina, it was judged not to be consistent with current land use plans.

In this current draft RI/FS and SEIS, implementation of Habitat Action No. 13 identified by the Pilot Team seems to have been dismissed as an alternative because no funding mechanisms have been identified to implement this type of project (see SEIS page 3-52). Just because the Port of

Bellingham chose not to identify funding mechanisms for this alternative does not mean that the funding mechanisms do not exist or that this alternative should not have been evaluated. The Feasibility Study and the SEIS should be revised to incorporate an evaluation of the implementation of Habitat Action No. 13 alternative.

2. The draft SEIS should have been written in a manner to also address National Environmental Policy Act (NEPA) requirements. Writing the SEIS in a manner that addresses both State Environmental Policy Act (SEPA) and NEPA requirements would ensure that the required federal permitting for the proposed clean up actions would be more stream-lined. This combined approach would better achieve Bellingham Bay Pilot Goal 6 (i.e., *Implement actions that are more expedient and more cost-effective, through approaches that achieve multiple objectives*). As written, the SEIS does not comply with NEPA because cumulative effects and environmental justice issues associated with the evaluated alternatives were not considered.

Similar to SEPA, federal impact assessments specifically require treatment of cumulative effects during EPA and EIS procedures: “Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances, since cumulative impacts result in the compounding of the effect of all actions over time. Thus, the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource, no matter what entity (federal, non-federal or private) is taking the actions.” (EPA 315-R-99).

In addition, Executive Order 12898 of February 11, 1994 requires federal agencies to achieve environmental justice by addressing “disproportionately high and adverse human health and environmental effects on minority and low-income populations.” The impacts of the project, both negative and positive, on minority and low-income populations must be analyzed. Environmental Justice issues include potential impacts on the physical and natural environment as well as social, cultural, and economic effects of the project. Based on the 2000 Census, the Lummi tribal members comprise the largest low income, minority population in the area and the physical, natural, social, cultural, and economic impacts of the proposed alternatives on the Lummi people need to be specifically addressed.

The SEIS should be revised to comply with NEPA and specifically address both cumulative effects and environmental justice issues for each alternative.

3. The characterization of affected fish and wildlife habitat in the SEIS is based on current conditions rather than the more appropriate environmental baseline that existed along what is now the Bellingham waterfront prior to the substantial anthropogenic impacts to this environment. The Lummi Nation is a fishing tribe and has used the waters and shorelines of Bellingham Bay since time immemorial. The Lummi Nation is one of the signatories to the Point Elliot Treaty of January 22, 1855 (12 Stat. 927) which was ratified by the United States Senate on March 8, 1859, Proclaimed April 11, 1859 and which reserves certain rights for the Lummi people including but not limited to “the right of taking fish at usual and accustomed grounds and stations” and “hunting and gathering roots and berries on open and unclaimed lands.” The decision of *United States v. Washington* (384 F. Supp. 312, 377 [W.D. Wash. 1974], aff’d, 520 F.2d 676 [9th Cir. 1975], cert. Denied, 423 U.S. 1086

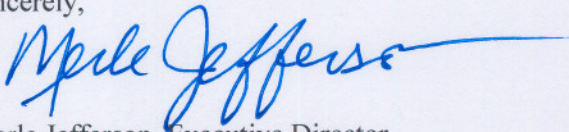
[1976]) and subsequent court orders, as upheld by the United States Supreme Court, provide rules of engagement of the Lummi Nation and other co-managers relating to natural resources management.

Prior to and following the arrival of Euro-Americans, the shorelines of Bellingham Bay were used as fishing villages and the tidelands and waters of Bellingham Bay were used to harvest fin- and shellfish for commercial, subsistence, and ceremonial purposes. Although the Lummi Nation still fishes the waters of Bellingham Bay, the resources have been degraded by human activities and shoreline development has precluded the use of traditional hunting, fishing, and gathering sites along the bay. As shown in Figure 1 and detailed in Figure 2, approximately 748 acres of the Bellingham Bay nearshore has been impacted (dredged, filled, or armored) including the Whatcom Waterway and the Aerated Stabilization Basin (ASB). In addition to these actions, which have physically precluded the exercise of tribal treaty rights in these areas, the Whatcom Waterway, the ASB, and surrounding areas are contaminated with a number of substances released from industrial waterfront activities including mercury discharges from the former Georgia Pacific chlor-alkali plant. By adopting the degraded current conditions as an environmental baseline, the environmental impacts of the proposed alternatives are lessened. Addressing cumulative effects and environmental justice issues will result in a more accurate assessment of the impacts of each alternative.

In summary, objectively addressing both cumulative effects and environmental justice issues and adding the Bellingham Pilot Team Habitat Action No. 13 as an alternative would help complete the analysis and support the selection of an appropriate preferred alternative.

In addition to these general comments, Attachment 1 to this letter identifies specific comments regarding the RI/FS and the SEIS.

Sincerely,

A handwritten signature in blue ink that reads "Merle Jefferson". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Merle Jefferson, Executive Director
Lummi Natural Resources Department

cc Evelyn Jefferson, LIBC Chairwoman
Elden Hillaire, Lummi Natural Resources Commission Chairman

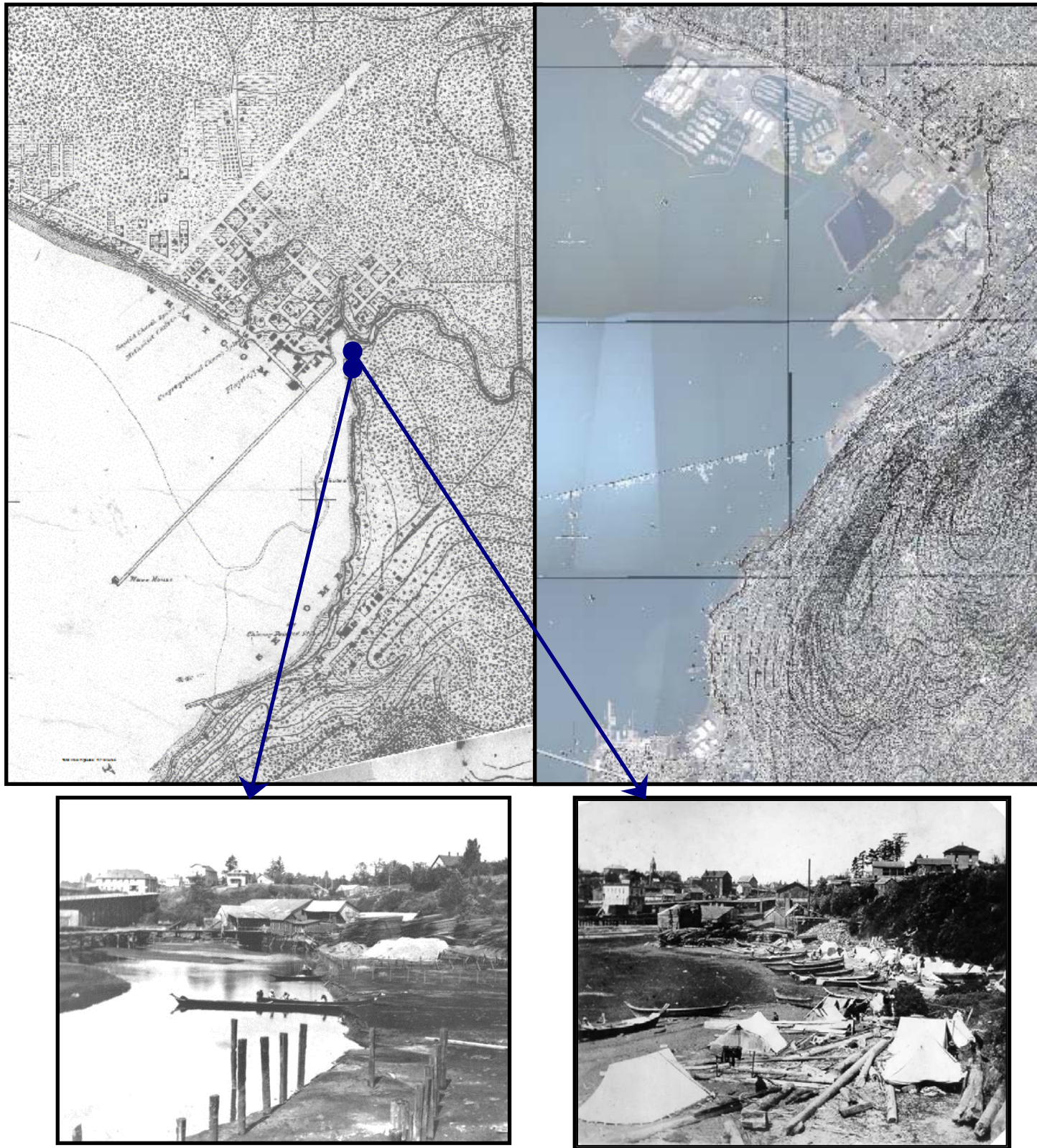


Figure 1. Bellingham Bay Nearshore Impacts

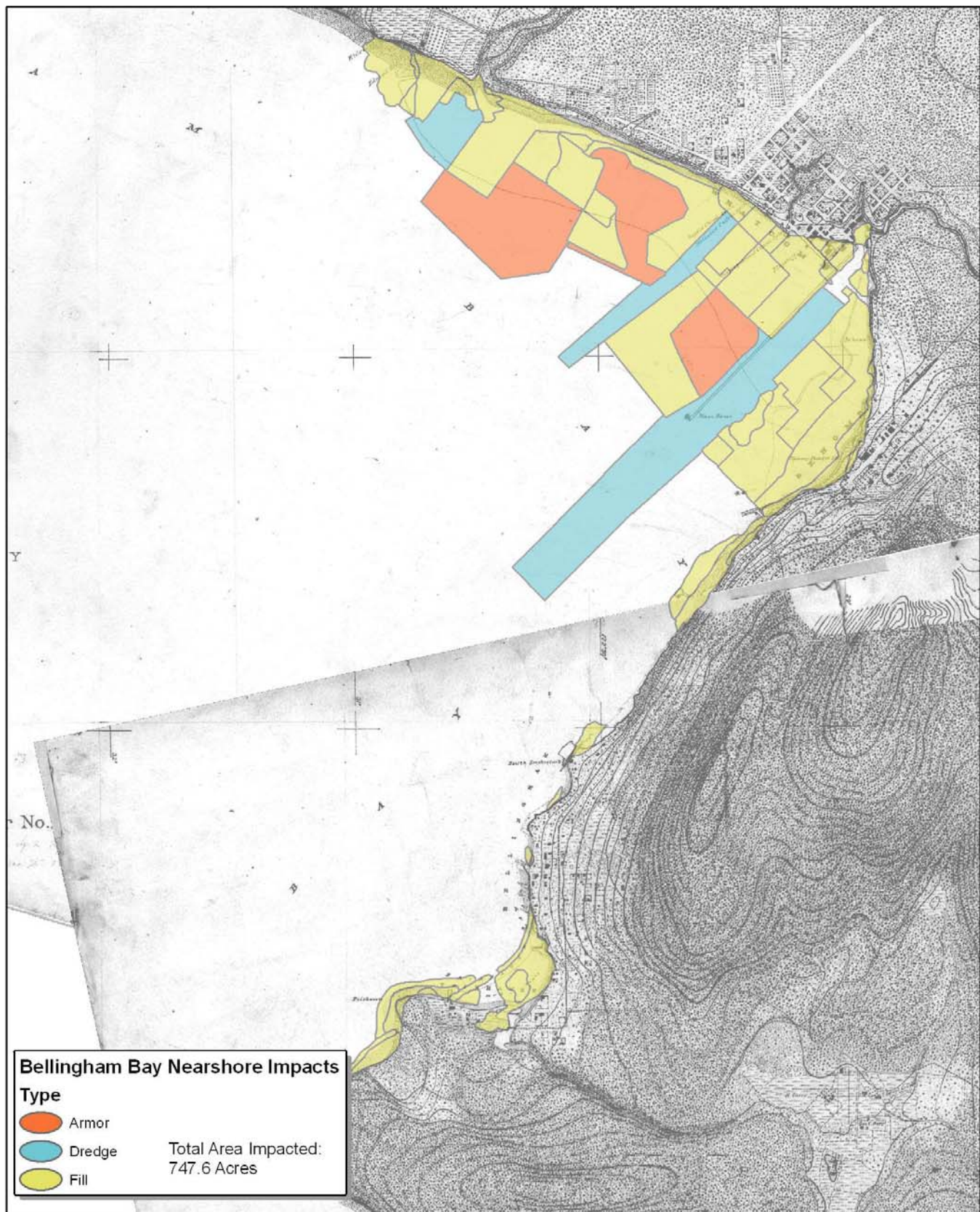


Figure 2. Bellingham Bay Nearshore Impacts

Attachment 1

Specific Comments Submitted by the Lummi Nation Regarding the October 10, 2006 Draft Remedial Investigation (RI), Feasibility Study (FS), and Supplemental Environmental Impact Statement (SEIS): Bellingham Bay Comprehensive Strategy – Whatcom Waterway Cleanup Site

Document	Page/Location	Comment
RI	General	Please include an evaluation of data quality for both analytical and bioassay results. The appendices do include some level of quality assurance reporting for the Colony Wharf and 2003 ASB sampling event. However, the newer data collected to support the Supplemental RI are not discussed or evaluated. Consider an additional appendix that summarizes or contains data assessments from the previous investigations that would help document that the data collected over the life of the project thus far are of sufficient quality for decision making.
RI	Page 1-1	Please provide a description of the major stakeholders and decision makers involved in the project to clarify the role Ecology and the Port of Bellingham have in the cleanup. For example, who will be responsible and accountable for selection of the remedy, management of remedial construction, and long-term monitoring after the remedy is in place? Which organization(s) is funding the cleanup activity?
RI	Page 4-5	<p>Please clarify the regression relationship between estimated home range sediment concentrations and concentrations in tissue samples. There are several technical issues that need to be addressed either in this section or in Appendix E:</p> <ul style="list-style-type: none"> • It appears that the upper range of Dungeness crab data used in the regression analysis ends at 0.91 mg/kg, which is lower than the proposed BSL value. It is generally not statistically valid to extrapolate (or predict) a functional relational relationship beyond the measured range of data used in a regression (<i>Biostatistical Analysis</i>, J.H. Zar, 1984). Consequently, the statement that the Dungeness crab regression represents a conservative upper-bound estimate of mercury bioaccumulation is not technically correct. • The regression of English sole had a <i>p</i> value for the slope greater than 0.05 (Appendix E). The text should clarify that this means that the slope of the regression line for this species was not significantly different from zero, and that there is no functional relationship between sediment mercury concentrations and tissue concentrations in English sole. It is clear in Appendix E that the English sole data were not used in the calculation of the final BSL, however, this section (and Appendix E) should identify that the utility of the English sole data is limited in regards to developing the final BSL.

Document	Page/Location	Comment
RI	Page 4-6	The discussion of fish consumption rates should clarify which consumption rates were actually used to calculate the BSL. It is not clear that the bottomfish/shell fish consumption rate of 70 g/day was the value used to calculate the BSL and that the 173 g/day value represents total seafood consumption. This is an important point to clarify since bottomfish and shellfish represent only a fraction of the potential seafood diet of a subsistence fisher with the remainder coming from salmonid or pelagic species. If the BSL represents an estimated mercury intake to just below the reference dose, then any additional seafood consumption could push the daily total above 0.0001 mg/kg/day. Given the recent seafood advisory issued by the Washington State Department of Health for salmon species in Puget Sound, the total intake of mercury from seafood is an important issue for sensitive or subsistence fisher populations.
RI	Page 6-2	Propeller wash and anchor drag are only given cursory consideration in the RI report. No specific information on potential depths of scour by propeller wash in Whatcom Waterway is presented. Wind and wave conditions have been considered in developing the remediation plan, but storm surge was not specifically incorporated. Although it is acknowledged that storm surge would be most severe under high wind and wave conditions, it still should be addressed. Please identify and discuss any other factors, such as the impact of net weight lines or crab pots from fishing activity, that might impact sediment stability if use of the site changes in the future?
RI	Appendix I, Table 4-2	Mercury contamination is shown to be increasing over time for sample sites identified as SS-301, SS-40, and SS-WP-1 but an explanation for this increase is only provided for sample site SS-WP-1. Please provide an explanation as to why mercury contamination increased in the other two sample locations.
FS	General	Feasibility Study is not complete and should have evaluated the complete removal and restoration of the ASB site (Habitat Action No. 13 identified in the 2000 Comprehensive Strategy EIS).
FS	Page 3-1	Please clarify what the specific cleanup objectives are for the Whatcom Waterway remediation. There is a discussion of the applicable SMS standards and the BSL, but it is not clear how they will be applied in the determination that the remedial action is complete. Is the intent to meet SQS or MCUL? If a sample exceeds the MCUL, but passes the bioassay, would cleanup to the BSL be initiated? Please provide a decision tree or flow chart to state the remediation goals more explicitly.
FS	Page 4-5	Please evaluate the potential for discharges from Whatcom Creek to erode contaminated sediment from the tidal flats at the east end of the Inner Waterway.
FS	Page 4-12	The impact of propeller wash and the type of vessels used in the area are not fully described in the discussion of the alternatives. Please more thoroughly evaluate the potential impact of propeller wash.
SEIS	General	The evaluation of alternatives is not complete as the remedial action of complete removal and restoration of the ASB site (Habitat Action No. 13 identified in the 2000 Comprehensive Strategy EIS) was not evaluated.
SEIS	General	Not complete, cumulative effects and environmental justice issues not evaluated.

Document	Page/Location	Comment
SEIS	Pages 1-2 and 2-12	The RI/FS does <u>not</u> provide a comprehensive evaluation of clean-up options. Should evaluate the alternative represented by Habitat Action No. 13 to make the evaluation comprehensive.
SEIS	Pages 1-6 and 2-13	Should note that the federal permitting process also includes an evaluation of issues in terms of cumulative effects and environmental justice.
SEIS	Page 1-7	List of primary areas of controversy and uncertainty is incomplete. Should also include: <ul style="list-style-type: none"> • Future of the aquatic lands currently used for wastewater treatment (ASB) and associated impacts to treaty rights – conversion of the ASB to a marina as desired by the Port of Bellingham will continue to preclude tribal access to fishing grounds • Cumulative effects and the appropriate environmental baseline for comparative analysis • Environmental justice
RI, SEIS	Page 2-1	The Site Area History section is incomplete and completely ignores the fact that the Bellingham Bay shoreline was used by Lummi tribal members for fishing village sites since time immemorial and after the arrival of euro-Americans. This section also fails to describe the habitat features of the bay (e.g., extensive eelgrass beds) and associated natural production of shellfish for ceremonial, subsistence, and commercial benefits that existed prior to the anthropogenic impacts that resulted in approximately 748 acres of the Bellingham Bay nearshore (including the Whatcom Waterway and the Aerated Stabilization Basin [ASB]) being dredged, filled, or armored (see Figure 1 and Figure 2).
SEIS	Page 3-5	The section on anthropogenic shoreline modifications should be more quantitative and state that based on a comparison of the historic shoreline and current conditions (Wahl 2003), approximately 748 acres of the Bellingham Bay nearshore (including the Whatcom Waterway and the Aerated Stabilization Basin [ASB]) being dredged, filled, or armored (see Figure 1 and Figure 2).
SEIS	Page 3-8	Nooksack River watershed characterization is inaccurate and incomplete. Lake Whatcom is part of the Whatcom Creek watershed, there is no discussion of 303(d) listings or of the Lower Nooksack River fecal coliform TMDL, no discussion of impacts of channelization.
SEIS	Pages 3-25 through 3-31	Should be clear regarding the environmental baseline and revise text such as the following: 3-26: no surf smelt or sand lance spawning has been documented in inner Bellingham Bay, presumably because suitable substrates are <u>no longer</u> available. 3-27: shellfish densities are <u>currently</u> relatively low. 3-28: Because the Whatcom Waterway <u>currently</u> has relatively limited quantities of these habitats... 3-31 Whatcom Waterway <u>currently</u> serves more as a migration corridor between Whatcom Creek and the Whatcom Creek estuary than nursery/rearing habitat given the <u>current</u> lack of suitable substrate and refuge.
SEIS	Page 3-30	The Bald eagle is still protected by the federal Endangered Species Act.

Document	Page/Location	Comment
SEIS	Page 3-30	Peregrine falcons are delisted under the federal Endangered Species Act.
SEIS	Page 3-46	The section on shellfish harvesting should recognize the habitat losses that have occurred due to anthropogenic impacts. Early mapping of Bellingham Bay and the presences of shell middens in the archaeological sites described on Page 3-59 suggest that historically the shellfish habitat in this section of Bellingham Bay was very good.
SEIS	Page 3-46	The section on salmon fisheries should note the habitat losses that have occurred due to anthropogenic impacts. Early mapping of Bellingham Bay and the associated extensive eelgrass beds suggest that habitat for a variety of forage fish (e.g., herring, surf smelt, sand lance) existed in the action area.
SEIS	Page 3-52	Habitat Action No. 13 identified in the 2000 Comprehensive Strategy EIS appears to be dismissed in this section of the SEIS by relying on the argument that no funding mechanisms have been identified to implement this action and alternative uses of the ASB have formed the basis of recent land use planning efforts. It is noted that at the time of the 2000 Comprehensive Strategy EIS development, no entity looked for these funding mechanisms because at the time the ASB was still being used for wastewater treatment. Potential funding sources for implementing this action include state and federal funding associated with the salmon recovery effort and/or the Puget Sound Partnership; the Port of Bellingham increasing moorage rates for recreational boaters; and the Port of Bellingham exercising its county-wide taxing authority. Regarding recent land use planning efforts, these efforts have been driven by what the Port of Bellingham (one member of the Bellingham Bay Pilot Team) wants to do, not what all members of the Bellingham Bay Pilot Team agreed to do.
SEIS	Page 3-53	In the discussion of converting the ASB to a marina, one of the arguments provided in favor of the conversion is “net gains in both habitat and public access opportunities.” The accuracy of this assessment depends on the environmental baseline used to conduct the evaluation and whether or not cumulative effects, environmental justice, and impacts to treaty rights are considered. As written, current degraded conditions are being considered the environmental baseline and cumulative effects, environmental justice, and impacts to treaty rights are <u>not</u> considered. As stated in the SEIS, if completed according to the design concept, the ASB marina would reconnect the 28-acre ASB area to Bellingham Bay and restore nearly 4,500 linear feet of salmonid migration corridor. In contrast, if Habitat Action No. 13 identified by the Bellingham Pilot Team was implemented, 33-acres of inter-tidal and shallow subtidal habitat will be restored to eelgrass beds, forage fish habitat, shellfish habitat, and nursery/rearing areas for juvenile Dungeness crab. Because of all of the dredging, filling, and armoring that has occurred, these habitat types and the resultant shellfish densities and rearing habitat for juvenile crab are currently relatively low in the action area. In addition, implementing Habitat Action No. 13 would result in public access over these aquatic lands and specifically would not preclude tribal members from harvesting fin- or shellfish over this 33-acre area.